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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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MAR 17 2004

FILE: EAC 01 241 51480 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a chimney repair company. It seeks to employ the beneficiary permanently in the United States as a chimney mechanic/brick mason. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits contends that the director failed to adequately review the information furnished on the federal tax returns.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the Department of Labor's employment service system. Here, the petition's priority date is January 5, 1998. The beneficiary's salary, as stated on the labor certification, is $31.77 per hour or $66,081.60 per year based on a 40-hour week. The federal tax returns indicate that the petitioner was established in 1991 and is organized as a corporation. Part B of the ETA-750 reflects that the petitioner has employed the beneficiary since December 1997.

In support of the petitioner's ability to pay the proffered wage, counsel initially submitted a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for the year 1998. These returns indicate that the petitioner files its taxes based on a standard calendar year. The petitioner's 1998 corporate tax return reveals that it declared an ordinary income of -$5,205. Schedule L reveals that the petitioner had $19,072 in current assets and $10,634 in current liabilities, resulting in $8,438 in net current assets. Net current assets represent the difference between current assets and current liabilities. It reflects the level of liquidity that a petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the Schedule L balance sheet.

On October 22, 2001, the director requested additional evidence from the petitioner in order to establish its continuing ability to pay the beneficiary's wage offer of $66,081.60 per year. The director also advised the petitioner to submit copies of any Wage and Tax Statements (W-2s) issued to the beneficiary if the petitioner employed him, beginning as of the January 5, 1998, visa priority date. The petitioner responded by submitting a copy of its federal corporate income tax returns for 1999 and a partial copy of its 2000 tax return. They reflect that the petitioner declared $3,062 as ordinary income in 1999 and $5,738 as ordinary income in 2000. Schedule L of each return contained the following information:

Year	Current Assets	Current Liabilities	Net Current Assets
1999	$36,924	$66,367	-$29,473
2000	33,837	34,077	-240

The director denied the petition on April 11, 2002. He determined that neither the petitioner's net income, nor its net current assets revealed sufficient levels to pay the beneficiary's proposed salary.

On appeal, counsel asserts that the taxable income as shown on the petitioner's corporate tax returns do not reflect the financial health of the petitioning business. Counsel maintains that depreciation and officer compensation should be added back to the petitioner's net income. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). While the overall magnitude of a petitioner's business activities should be considered when the petitioner's ability to pay is marginal, it is not reasonable to consider gross income or other revenue without considering the expenses that were incurred to generate that income. *See K.C.P. Food Co. Inc., v. Sava, supra.*

Similarly, counsel's argument that the level of officer compensation shows its ability to pay the proffered wage to the beneficiary is not persuasive in light of the discussion above and the requirement that the continuing ability to pay must be established as of the priority date of the visa petition. Similar to other expenses already incurred, the prior distribution of officer compensation represents monies that were not available to pay the proffered wage.

It is also noted that although the amount of compensation already paid to a beneficiary may be considered as part of the petitioner's ability to pay the beneficiary's wage offer, the petitioner here failed to submit any credible evidence of the payment of wages to the beneficiary.

In view of the foregoing and following a review of the evidence contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing ability to pay the proffered wage as of the visa priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.